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IN THE
SUPREME COURT of the UNITED STATES
October Term, 1974

NATHANIEL W. BOYD, III, D.O.,
Petitioner

v. No. _____

COMMONWEALTH OF PENNSYLVANIA
STATE BOARD OF OSTEOPATHIC EXAMINERS,
Respondent.

Petition for Writ of Certiorari
to the Commonwealth Court of the
Commonwealth of Pennsylvania

BRIEF FOR PETITIONER

Petitioner, NATHANIEL W. BOYD, III, D.O., respectfully prays this Court to issue a Writ of Certiorari to review the final decision of the Commonwealth Court of the Commonwealth of Pennsylvania, which decision was entered on March 27, 1974. Petitioner petitioned the Supreme Court of Pennsylvania for an allowance of appeal which was denied on July 19, 1974. A petition for reconsideration was denied on November 4, 1974, the notice of which was dated November 12, 1974.

OPINION BELOW

The decision of the Commonwealth Court is set forth and the denials of the Supreme Court of Pennsylvania are set forth in the Appendix, starting at A-1.

JURISDICTION

The jurisdiction of the Court is invoked under Title 28 United States Code, Section 1254.

QUESTIONS PRESENTED

I. DOES A STATE BOARD OF OSTEOPATHIC EXAMINERS DEPRIVE PETITIONER AND HIS PATIENTS AND THE PUBLIC OF THEIR CONSTITUTIONAL RIGHTS TO FREEDOM OF EXPRESSION, TO PRIVACY AND TO PREVENT DEFENDANTS FROM DEPRIVING PETITIONER, A PHYSICIAN, OF HIS RIGHT TO EARN A LIVING AND HIS PROPERTY RIGHTS, AND DO A PETITIONER, HIS PATIENTS AND THE PUBLIC HAVE CONSTITUTIONAL RIGHTS TO PRIVACY, TO BE LET ALONE, AND DOES PETITIONER HAVE A CONSTITUTIONAL RIGHT TO TELL HIS PATIENTS AND THE PUBLIC ABOUT NON-HOSPITAL, NON-SURGICAL METHODS OF HEALTH CARE AND HEALING AND DO HIS PATIENTS HAVE A RIGHT TO KNOW THIS INFORMATION AND DOES PETITIONER HAVE A CONSTITUTIONAL RIGHT TO PRACTICE OSTEOPATHY AND TO EARN A LIVING?
Petitioner submits that the answer is "yes."

II. DOES RESPONDENT'S SUSPENSION OF PETITIONER'S LICENSE TO PRACTICE OSTEOPATHY ON THE GROUNDS THAT PETITIONER ADVERTISED A BOOKLET ON NON-SURGICAL, NON-HOSPITAL CORRECTION OF HEMORRHOIDS, HERNIA AND PROSTATE PROBLEMS, WHICH BOOKLET CONTAINED TRUTHFUL INFORMATION, DEPRIVE PETITIONER OF HIS CONSTITUTIONAL RIGHTS, BECAUSE SUCH ADVERTISING AND SUCH BOOKLETS ARE PROTECTED BY THE FREEDOM OF SPEECH AND FREEDOM OF PRESS GUARANTEES OF THE FIRST AMENDMENT EVEN IF PETITIONER CHARGES A FEE FOR THE HEALING SERVICE HE PERFORMS?
Petitioner submits that the answer is "yes."

STATEMENT OF FACTS

On November 14, 1974, the Pennsylvania State Board of Osteopathic Examiners (Board) caused petitioner's license to practice osteopathic medicine and surgery to be suspended for six months starting in December 1974. State agents took

petitioner's license from his office on December 16, 1974.[1] Petitioner has been practicing osteopathy in York County for over 25 years. Never has a patient complained or filed a lawsuit for malpractice. The Board has not questioned petitioner's skill as an osteopathic physician and surgeon. The grounds for suspension are advertisements, defendants alleged are "unethical."

Since 1951, petitioner has purchased ad space in Pennsylvania and Maryland newspapers and has offered a booklet on the non-hospital or non-surgical treatment of hemorrhoids, hernia and prostate problems. The booklet factually explained to the public that a non-hospital alternative treatment for these problems was available. The booklets were in good taste, did not solicit patients and did not make any false or misleading representations. The newspaper advertising did not solicit patients and merely offered the booklet.

Petitioner has approximately 60 patients under treatment. Doctors who treat these problems without hospitalization are few and far between. The future patients will suffer if the suspension continues. Petitioner emphasizes his skill as a healer has never been challenged by the State or by the defendants. Petitioner does not treat cancer, and if hospitalization is necessary, or if the patient has cancer, he refers the patient to another doctor.

Dr. Boyd is an osteopath, a distinct healing art which prides itself on its ability to offer alternatives to allopathic medicine as practiced by M.D.'s. This alternative has historically involved less drastic and dangerous modalities than

---

[1]Petitioner and respondent disagree slightly on the effective date of the suspension. The date respondent physically removed petitioner's license was December 16, 1974.

surgery and certain drugs. He has been adhering to the principles of osteopathy and has been advertising his booklet to inform citizens about alternatives to hospital surgery for hemorrhoids, hernia and prostate enlargement.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are the First, Fourth, Fifth, Ninth and Fourteenth Amendments of the United States Constitution.

ARGUMENT

I. DOES A STATE BOARD OF OSTEOPATHIC EXAMINERS DEPRIVE PETITIONER AND HIS PATIENTS AND THE PUBLIC OF THEIR CONSTITUTIONAL RIGHTS TO FREEDOM OF EXPRESSION, TO PRIVACY AND TO PREVENT DEFENDANTS FROM DEPRIVING PETITIONER, A PHYSICIAN, OF HIS RIGHT TO EARN A LIVING AND HIS PROPERTY RIGHTS, AND DO A PETITIONER, HIS PATIENTS AND THE PUBLIC HAVE CONSTITUTIONAL RIGHTS TO PRIVACY, TO BE LET ALONE, AND DOES PETITIONER HAVE A CONSTITUTIONAL RIGHT TO TELL HIS PATIENTS AND THE PUBLIC ABOUT NON-HOSPITAL, NON-SURGICAL METHODS OF HEALTH CARE AND HEALING AND DO HIS PATIENTS HAVE A RIGHT TO KNOW THIS INFORMATION AND DOES PETITIONER HAVE A CONSTITUTIONAL RIGHT TO PRACTICE OSTEOPATHY AND TO EARN A LIVING? YES.

Petitioner's patients and the public have a right to be educated on the subject of non-hospital, non-surgical techniques. Kline v. Vlandis (D. Conn., 1972) 346 F. Supp. 526. Cf. Kerr v. Enoch Pratt Free Library (CA 4 1945) 149 F. 2d 212, cert. den. 326 US 721; Smith v. Hampton Training School for Nurses (CA 6 1966) 360 F. 2d 577.

Dr. Boyd's property rights are protected by the Fourteenth Amendment. Adams v. Park Ridge (CA 1961) 293 F. 2d 585; Tichon v. Harder (CA 2 1971) 433 F. 2d 1396; Cisneros v. Cavell (CA 3 1971) 438

F. 2d 1202, 1203. The right of commercial enterprise is a Fifth and Fourteenth Amendment right, according to the U.S. Supreme Court in Algeyer v. Louisiana (1897) 165 U.S. 578.

The U.S. Supreme Court in 1973, in Roe v. Wade 410 U.S. 113, and Doe v. Bolton 410 U.S. 179, "the abortion cases," extended the Bill of Rights freedoms inherent in the Fourteenth Amendment to doctors and their patients, thereby immunizing from state intervention the choice between having an abortion or having a baby. Petitioner contends that he and his patients and the public have rights to this same protection when the treatments are other than abortion. This issue is the same: the freedom of the patient to choose a method of medical treatment and the doctor to provide the treatment chosen even if the state and other physicians and professional associations disagree with the treatment. This right to privacy in health matters, the U.S. Supreme Court held in the "Abortion case," is in a private zone where intrusion by the state and state officers is not only unwelcome, but is forbidden.

Mr. Justice Blackmun in Roe v. Wade at 410 U.S. at 152:

> ...(t)he Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts the Court or Individual Justices have indeed found at least the roots of that right in the First Amendment.

Concurring at 410 U.S. 213, Mr. Justice Douglas listed as a right retained by the People under the Ninth Amendment:

> ...the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf. (Emphasis by Mr. Justice Douglas.)

These basic rights to life, health and liberty are real and guaranteed under the Ninth Amendment if not implied as rights of the People elsewhere in the Bill of Rights and the Fourteenth Amendment. The State cannot deny basic and general rights merely because the Founding Fathers could not protect us from every conceivable misuse of power of which the state is capable. Further, the right to life is a constitutionally-protected right. Brazier v. Cherry (CA 5 1961) 293 F. 2d 401, certiorari denied 368 US 921; Delatte v. Genovese ED La. 1967) 273 F. Supp. 654.

If a woman can destroy an unborn fetus because her body is private and her own private business and not that of the state, then a man or woman should be able to attend to any other body "problem" without state interference; otherwise, citizens with an unwanted physical condition, other than pregnancy, and their doctor are discriminated against if denied the freedoms that are given to abortion, and to doctors who practice that art, and their patients who want abortion. Certainly, abortion is not the only medical treatment immune from state interference as to matters of choice and truthful, factual information.

The U.S. Supreme Court recognized the right to privacy as a constitutional right in 1965. Griswold v. Connecticut 391 U.S. 479. Deprivations of equal protection of the law and discrimination are wrongs from which persons are protected by the Fourteenth Amendment.

II. DOES RESPONDENT'S SUSPENSION OF PETITIONER'S LICENSE TO PRACTICE OSTEOPATHY ON THE GROUNDS THAT PETITIONER ADVERTISED A BOOKLET ON NON-SURGICAL, NON-HOSPITAL CORRECTION OF HEMORRHOIDS, HERNIA AND PROSTATE PROBLEMS, WHICH BOOKLET CONTAINED TRUTHFUL INFORMATION, DEPRIVE PETITIONER OF HIS CONSTITUTIONAL RIGHTS, BECAUSE SUCH ADVERTISING AND SUCH BOOKLETS ARE PROTECTED BY THE FREEDOM OF SPEECH AND FREEDOM OF PRESS GUARANTEES OF

THE FIRST AMENDMENT EVEN IF PETITIONER CHARGES A FEE FOR THE HEALING SERVICE HE PERFORMS? YES.

The First Amendment rights, including freedom of religion, freedom of speech, freedom of the press, freedom of assembly and freedom of association, are protected by the Fourteenth Amendment. Minersville School District v. Globitis (U.S. Supreme Court, 1949) 310 U.S. 586; Douglas v. City of Jeannette (1943) 319 U.S. 157 rehearing denied, 319 U.S. 782; Near v. Minnesota (1931) 283 U.S. 697.

The right to distribute literature has been held to be protected by the First and Fourteenth Amendments. Tinker v. Des Moines School Dist. (1969) 393 U.S. 503, 508; Terminiello v. Chicago (1949) 337 U.S. 1, 69.

The right to buy pornographic books and pictures and political activist newspapers is followed by the right to possess even obscene movie films in the privacy of one's own home. The Supreme Court held in Stanley v. Georgia (1969) 394 U.S. 557, 564-565.

The First Amendment allows petitioner to discuss openly and freely all matters of public concern. Thornbill v. Alabama (1940) 310 U.S. 88; Martin v. City of Struthers (1943) 319 U.S. 141; Lamont v. Postmaster General (1965) 381 U.S. 301. First Amendment protection covers the kind of expression respondents claim justifies suspension of petitioner's license. The First Amendment protects a doctor, such as plaintiff, when that doctor publishes information that causes concern over excessive surgery, over-utilization of hospitals and pain and complications from surgery. The First Amendment protects this kind of advertising. The U.S. Supreme Court has rejected attempts to exclude categories of speech and expression from the protection of the First Amendment by attaching labels on the particular type of speech or expression that offended someone. NAACP v. Button (1963) 371

U.S. 415; New York Times Co. v. Sullivan (1964) 376 U.S. 254. Rather than looking at labels, the Supreme Court looks at content.

Advertising has been given First Amendment protection. The U.S. Court of Appeals for the Ninth Circuit rejected the "rather curious view that by nature all advertisements are necessarily devoid of literary, artistic or social value." U.S. v. Young (1972) 465 F. 2d 1096, 1100-01.

In Martin v. City of Struthers, supra, the U.S. Supreme Court declared unconstitutional an ordinance which prohibited the summoning of occupants of a residence to receive advertisements. In Hiett v. U.S.(1969) 415 F. 2d 664, the U.S. Court of Appeals for the Fifth Circuit held that the distribution of advertisements soliciting Mexican divorces is protected by the First Amendment and that a statute which operated to prohibit the use of the mails to distribute information on Mexican divorces was unconstitutional. The Court rejected the argument that "commercial" advertising was not protected by the First Amendment, and held that an advertisement which conveys "information on matters of social importance ... is also given extensive Constitutional protection." Hiett, supra at 672.

One such matter of "social importance" is apparently whether to have a baby or an abortion. Attempts by government officers to restrict the advertising of abortions have been deemed unconstitutional by federal courts. Associated Students for The University of California at Riverside v. Attorney General (CD Ga. 1973) 368 F. Supp. 11; Atlantic Co-op News Project v. U.S. Postal Service (ND Ga. 1972 - 3 judge court) 350 F. Supp. 234.

The solicitation of funds and profit are also protected by the First Amendment. New York Times v. Sullivan (1964) 376 U.S. 254; Smith v. People of the State of California (1959) 361 U.S. 147, 150, rehearing denied (1960) 361 U.S. 950.

The fact that plaintiff is paid a fee for the service he renders as an osteopathic physician and

surgeon should make no difference and should not deprive him of his constitutionally-guaranteed right to freedom of speech and freedom of the press.

In Smith v. People of the State of California, supra, at 361 U.S. 150, Mr. Justice Brennan held:

> It is of course no matter that the dissemination takes place under commercial auspices.

In Ginzburg v. U.S. (1966) 383 U.S. 463, Mr. Justice Brennan wrote:

> ...(C)ommercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment. (Citing New York Times, supra, and Smith, supra.)

Nevertheless, the U.S. Supreme Court's 1942 opinion, Valentine v. Chrestensen, 316 U.S. 52, has prompted the siting of this case of limitation of First Amendment freedoms for the principle that "commercial advertising" is not protected by the First Amendment. In Crestensen, an owner of a submarine sold tickets for tours on the boat and advertised by way of handbills in violation of a health ordinance of the City of New York. On the handbill advertising his tour, he placed a "moral platitude." The Supreme Court did not consider his advertising worthy of First Amendment protection. However, this means merely that one cannot litter and claim First Amendment protection whether the written content of the litter is commercial, political or religious. The commercial nature of motive or content is of no moment.

Commenting on Crestensen in his concurring opinion in Cammarano v. U.S. (U.S. Supreme Court, 1959) 358 U.S. 498 at 534, Mr. Justice Douglas said:

> The ruling was casual, almost offhand. And it has not survived reflection. That "freedom of speech or of the press" directly guaranteed

> against encroachment by the Federal Government and safeguarded against state action by the Federal Government and safeguarded against state action by the Due Process Clause of the Fourteenth Amendment is not in terms or by implication confined to discourse of a particular nature and kind ... the profit motive should make no difference. ...
> (Emphasis Added.)

The note, "Freedom of Expression in a Commercial Context" 78 Harvard Law Review 1191, 1196, makes a cogent distinction between two kinds of advertising: (1) purely informational advertising, and (2) repetitive, motivating advertising:

> A distinction may perhaps be drawn between purely informational advertising like a telephone listing, and repetitive and want-creating advertising, the former at least being protected by the First Amendment.

In the defendants' suspension of petitioner's license to practice his healing art, plaintiff was not charged with creating any want for office treatment of hemorrhoids, hernia or prostate difficulties. The illnesses had already created the want. Petitioner was only providing those who already wanted relief with information on one source of relief.

Petitioner's message to the public is delivered to potential patients at a time and under circumstances that afford potential patients ample opportunity for r ~lection and discussion.

The "time to thin" test evolved from the "clear and present danger" test in Whitney v. People of the State of California (1927) 274 U.S. 35 and the requirement in Dennis v. U.S. (1951) 341 U.S. 494 at 507 that the First Amendment does "not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce

such action." (Emphasis added.) Brandenburg v. Ohio (1969) 395 U.S. 444 at 447.

In Giboney v. Empire Storage and Ice Co. (1949) 336 U.S. 490, 498, the U.S. Supreme Court applied the "time to think" test where the advertising was not coercive.

Plaintiff's message is neither motivating nor directed to produce immediate action of any kind and the service, the injection method of correcting hemorrhoids, hernia and prostate difficulties, is not illegal. Plaintiff's message is informative and leaves ample time and opportunity to ponder and discuss alternatives. Petitioner's message is legal and ethical and suspending his license for spreading that message is a violation of the First Amendment.

Another distinction is between advertising an inherently illegal "commercial" activity and advertising an illegal activity. In the case at Bar, petitioner's services were legal and not challenged by defendants.

Advertising that has impact on attitude contains the type of expression the Founding Fathers meant to protect. Even "commercial" expression that would raise issues and cause a change in the law is protected by the First Amendment. In 1960, the U.S. Supreme Court held in Bates v. City of Little Rock 361 U.S. 516 at 524:

> Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinate interest which is compelling.

The state has no compelling subordinate interest in preventing the kind of advertising that defendants used as grounds to suspend petitioner's license. Petitioner's ability as a healer has never been questioned by respondents. Petitioner's methods have not been challeged by the respondent who presumably had the power, if not the duty, to challenge methods of healing that are harmful or fraudulent.

The constitutional rights of patients can be invoked by a physician. In Griswold v. Connecticut, supra, the U.S. Supreme Court noted that if the physician-petitioner had not been allowed to raise the constitutional rights of his patients, they probably would not be raised by anyone.

Dr. Boyd, the petitioner, is not charged with fraud or misrepresentation. Nor is he charged with causing any harm or posing any threat to patients. In suspending Dr. Boyd's license to practice, respondents charged him only with "unethical advertising." The justifiable limitation of speech and of the press in cases of fraud, misrepresentation and the promotion of dangerous and ineffective drugs or treatments must be distinguished from the limitation of speech and expression on grounds that the utterance violates some principle of professional ethics, a principle that has the effect of creating a monopoly of ideas. The realm of health should not be set aside as an area where the freedom of expression can be restricted whenever it suits the economics or politics of doctors in positions of power.

The issue of medical advertising is currently before the U.S. Supreme Court in Bigelow v. Virginia (73-1309)

CONCLUSION

Petitioner, Dr. Boyd, prays this Court to grant a Writ of Certiorari.

Respectfully submitted,

John Joseph Matonis
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2603 P Street, N.W.
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Telephone: 202/338-4200
4201

Feb. 3, 1975

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of February, 1975, I served, by U.S. Mail, postage prepaid, a copy of this Petition for a Writ of Certiorari upon Lawrence Alexander, Esq. Office of the Pennsylvania Attorney General, Harrisburg, Pennsylvania.

JOHN JOSEPH MATONIS

IN THE COMMONWEALTH COURT OF
PENNSYLVANIA

NATHANIEL W. WOOD, III, D. O.,	:	
Appellant,	:	NO. 658 C.D. 1973
v.	:	
COMMONWEALTH OF PENNSYLVANIA, STATE BOARD OF OSTEOPATHIC EXAMINERS,	:	
Appellee.	:	

BEFORE:

HONORABLE JAMES C. CRUMLISH, JR.
Judge
HONORABLE HARRY A. KRAMER, Judge
HONORABLE ROY WILKINSON, JR., Judge
HONORABLE GLENN E. MENCER, Judge
HONORABLE THEODORE O. ROGERS, Judge
HONORABLE GENEVIEVE BLATT, Judge

ARGUED: DECEMBER 4, 1973

ANNEX "A"

O P I N I O N

OPINION BY JUDGE BLATT FILED MARCH 27, 1974

The State Board of Osteopathic Examiners (Board) suspended the license issued to Nathaniel W. Boyd, III, D.O. (appellant) to engage in the practice of osteopathy and surgery for a period of six (6) months. The suspension was based on his alleged violation of Section 14 of the Act of March 19, 1909, P.L. 46, as amended, 63 P.S. Section 271 (Osteopathic Law) and Section 9 of the Rules and Regulations of the Board.[1] The Act provides, in part:

> "The State Board of Osteopathic Examiners may refuse, revoke or suspend the right to practice osteopathy and surgery in this State upon any or all of the following reasons, to wit: ...the violation of the practice of osteopathy and surgery as defined in this act; misrepresentation; unethical conduct; or misleading, fraudulent or unethical advertising, including any form of pretense which might induce citizens to become a prey to professional exploitation:..."

---

[1]These rules, effectuated on September 30, 1964, were revised on October 9, 1969 but remain substantially unchanged. See 49 Pa. Code, Section 25.61 et seq.

The Board's adjudication quotes certain subsections of Regulation 9 of its Rules and Regulations which the Board considers relevant.[2] The "relevant portions" are as follows:

> "It shall be considered unethical for an osteopathic physician to engage in the following course or courses of action:
>
> "9.1. Inviting the attention of persons afflicted with particular or specific diseases.
>
> "9.2. Publishing reports of cases in the daily press, on television, or other nonprofessional mass communication media.
>
> "9.3. Presenting cases or reports of cases over the radio, television, or other nonprofessional mass communication media;

---

[2]We note that the final order did not specify which set of facts violated which specific subsections. Although we were able to review the order properly without such specificity and were able to see which facts fitted which violation, we believe that a more exacting adjudication could have alleviated some of the appellant's uneasiness about its alleged arbitrariness.

"9.5. Advertising professional services or soliciting of patients via newspapers, radio or television;

"9.7. Use of any public listing of specific diseases treated, methods used, or equipment possessed;

"9.12. To fail to designate or indicate by the term 'D.O.,' or 'Doctor of Osteopathy,' 'Osteopathic Physician,' 'Osteopathic Physician and Surgeon or some similar and definitive term indicating his school of practice in the professional use of his name.

"9.14. To engage in any other course of conduct resulting in a violation of the physician's duty to his patients and community at large as expressed in the Osteopathic Law of March 19, 1909, P.L. 46, and its amendments.

"It may be considered ethical to use in printed publication a simple dignified statement by a general practitioner which statement shall list only the name, profession, address, telephone number, office hours, and other necessary information. The listing of organs or a statement of the class of cases treated may be made by a physician who limits his practice to a specialty only, however, the listing of specific diseases shall

not be made."

The findings of fact upon which the Board based its conclusion indicate that (1) Boyd caused booklets to be sent through the mails which described treatments for hernia, rectal disorders and prostate gland enlargement and which contained pictures of his Clinic and advertisements for it; (2) Boyd caused advertisements for the treatment of prostate troubles and ruptures to be inserted in the Harrisburg Evening News; (3) Boyd paid for the newspaper advertisements by check; (4) Boyd's name, address and a picture of his Clinic appeared in the booklets received through the mails which advertised symptoms and treatment for hernia, ruptures, rectal disorders and varicose veins; and (5) those who answered the box number in the newspaper advertisement received Boyd's name and address on the booklets.

We must affirm the Board's adjudication, which we believe to be both in accordance with the law and supported by substantial evidence.

Recognizing that we are dealing with a penal statute which must be strictly construed, State Board of Osteopathic Examiners of Pennsylvania v. Berberian, 200 Pa. Superior Ct. 533, 190 A.2d 330 (1963), we find, nonetheless that there is clearly adequate evidence upon which a reasonable man could base the conclusion

that Boyd engaged in prohibited activities and that the findings of fact are sufficiently specific to enable an appellate court to review the Board action.[3] A.P. Weaver & Sons v. Sanitary Water Board, 3 Pa. Commonwealth Ct. 499, 284 A.2d 515 (1971). D'Anjolell v. State Board of Funeral Directors, 3 Pa. Commonwealth Ct. 64, 280 A.2d 123 (1971). The facts clearly establish that Boyd violated the regulations of his profession concerning unethical advertising.

The appellant contends that the actions of the Board were arbitrary and capricious, asserting that the Board refused to address itself to his charge that it was biased against him and prejudicially composed. His claim is based on the fact that three of the current Board members sat on the Board in 1967 when he was suspended for similar violations.[4] In support of his posi-

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[3]Contrary to the appellant's assertion, the Board did set forth in the facts the advertised body conditions, which it apparently considered to be "particular or specific diseases," thus substantiating a violation of Regulation 9.1.

[4]On that suspension, the parties stipulated that Boyd's appeal be sustained without prejudice to the Board to proceed against him if it deemed further action necessary.

tion the appellant cites the case of State Board of Chiropractic Examiners v. Hobson, 71 Dauph. 234 (1958), where, pursuant to affidavits made a part of the record, the court remanded the case to the Board to "free itself from any suspicion" of prejudice which might exist because the chairman of the Board was married to the appellant's former wife. Not only is Hobson, supra, distinguishable factually and procedurally but, the case at hand does not present a situation where a judicial or quasi-judicial officer has a direct, personal or substantial pecuniary interest in the outcome of the controversy. See Tumey v. Ohio, 273 U.S. 510 (1926).

In regard to the Board's composition Boyd further claims that it was comprised of seven osteopathic physicians rather than of five osteopaths and two medical doctors as required by the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. Section 126. As the appellee pointed out and as was verified by affidavit, however, the Board actually was properly composed, but a stenographic error improperly labelled two of the adjudicating medical doctors as "O.D.'s" on a published list of Board members. It is clear that a clerical error which does not prejudicially affect a complainant can not be the basis of a reversible error. Sharp's Convalescent Home v. Department of Public Welfare, 7 Pa. Commonwealth Ct. 623, 300 A.2d 909 (1973). And it is equally clear

here that the clerical error did not change the fact that the composition of the Board met all legal requirements.

Another basis for Boyd's allegation of arbitrary action on the part of the Board is his claim that the six month suspension ordered was an unduly harsh penalty. We find no abuse of discretion or illegality in the Board's imposition of this penalty nor can we substitute our own judgment for that of the Board's where, as here, the penalty is reasonable. Compare The Carver House, Inc. v. Liquor Control Board, 3 Pa. Commonwealth Ct. 453, 281 A.2d 473 (1971), with Benford v. Real Estate Commission, 8 Pa. Commonwealth Ct. 89, 300 A.2d 922 (1973).

The remaining allegations raised by Boyd concern constitutional infirmities which we find without merit. The legislature has authorized the Board to "make and adopt all necessary rules, regulations, and by-laws...to perform the duties and transact the business required under the provisions of this act." Section 5 of the Administrative Code Ancillaries, Act of March 19, 1909, P.L. 46, as amended, 71 P.S. Section 1141.[5]

---

[5]Portions of this section, none of which are material to this case, were repealed insofar as they were inconsistent with the Administrative Code of 1923, Act of June 7, 1923, P.L. 498, 71 P.S. Sec. 31.

Regulation 9 appropriately describes the conduct prohibited by Section 14 of the Osteopathic Law in regard to advertising.[6] Not only has the appellant failed to satisfy his burden of proving that the legislature had unconstitutionally delegated its powers, as required by Pennsylvania Crime Commission v. Nacrelli, 5 Pa. Commonwealth Ct. 548, 291 A.2d 363 (1972), but on the contrary, the regulations provide a protection for the appellant by satisfying the constitutional requirement of supplying "notice and clear description of what is prohibited conduct." Pennsylvania State Board of Pharmacy v. Cohen, 448 Pa. 189, 199, 292 A.2d 277, 282 (1972).

Most importantly, the regulations are substantively valid, being within the police power of the State and when, as in this case, the Commonwealth has satisfied its burden of proving that a violation has occurred, it is clear that reasonable

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[6]Unlike Berberian, supra, where the court construed "unethical conduct" as used in the statute to be limited to the doctor-patient relationship, these Rules properly described the broader term of "unethical advertising" which necessarily refers to the relationship between the osteopathic physician and the public.

punishments may be imposed by the Board. Our Supreme Court has held that advertising may be limited or abolished in the public interest without offending Constitutional protections, as it was in Ullom v. Boehm, 392 Pa. 643, 142 A.2d 19 (1958) where the advertising of prices by retailers for frames, mountings, lenses, spectacles or eyeglasses used for opthalmic purposes was prohibited. Although a statute which prohibited the advertisement of dangerous drugs was found to be unconstitutional in Pennsylvania State Board of Pharmacy v. Pastor, 441 Pa. 186, 272 A.2d 487 (1971), we are guided by the test used in that case requiring that "a law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained." 441 Pa. at 191, 272 A.2d at 491. The advertising regulations here concerned for osteopathic physicians evenhandedly and reasonably relate to the stated object of preventing the inducement of "citizens to become a prey to professional exploitation." Section 14 of the Osteopathic Law, 63 P.S. Section 271.

We likewise have found no procedural irregularities or violations of due process in the Board's actions. We, therefore, enter the following

O R D E R

NOW, March 27, 1974, the order of the State Board of Osteopathic Examiners is hereby affirmed, suspending for six (6) months the license of Nathaniel W. Boyd, III, D.O., to engage in the practice of osteopathy and surgery.

/S/ Genevieve Blatt
Genevieve Blatt, Judge

CERTIFIED FROM THE RECORD

MAR 27 1974

/S/ Frances C. Barbush
CHIEF CLERK

SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Sally Mrvos
Prothonotary
JANE C. REED
Deputy Prothonotary

HARRISBURG 17120

July 31, 1974

John W. Thompson, Jr., Esquire
103 East Market Street
York, Pa. 17401

Re: Com., State Board of Osteopathic Examiners v. Nathaniel W. Boyd, III, D.O., Petitioner
(No. 658 C.D. 1973 - Commonwealth Court)
No. 116 Allocatur Docket

Dear Sir:

The following Order was entered on both your Petition for Allowance of Appeal and Petition for Supersedeas as filed in the above entitled proceeding:

"July 19, 1974

Petition denied.
Per Curiam."

Paper books are returned herewith.

Very truly yours,

/S/ Jane C. Reed

Deputy Prothonotary

cc: Lawrence Alexander, Esquire

SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

SALLY MRVOS
Prothonotary
JANE C. REED
Deputy Prothonotary

HARRISBURG 17120

November 12, 1974

John W. Thompson, Jr., Esquire
103 East Market Street
York, Pa. 17401

Re: Com., State Board of Osteopathic Examiners v. Nathaniel W. Boyd, III, D.O., Petitioner
(No. 658 C.D. 1973 - Commonwealth Court)
No. 116 Allocatur Docket

Dear Sir:

The following Order was entered on both your Petition for Reconsideration to Allow Appeal and Petition for Supersedeas as filed in the above entitled proceeding:

"November 4, 1974

Petition denied.

Per Curiam."

Paper books are returned herewith.

Very truly yours,

/S/ Jane C. Reed

Deputy Prothonotary

cc: Lawrence Alexander, Esquire